

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SHELLEY DENTON, and all others similarly  
situated,

Plaintiff,

vs.

DEPARTMENT STORES NATIONAL BANK,

Defendant.

No. 3:10-cv-05830-RBL

DEFENDANT'S ANSWER AND  
AFFIRMATIVE DEFENSES TO THE  
FIRST AMENDED CLASS ACTION  
COMPLAINT

**ANSWER AND AFFIRMATIVE DEFENSES OF  
DEFENDANT DEPARTMENT STORES NATIONAL BANK**

Defendant Department Stores National Bank ("DSNB") answers the First Amended Class Action Complaint (the "Complaint") in this action as follows:

To the extent that the headings, preamble, or prayer for relief in the Complaint require a response, DSNB denies the allegations contained therein. With respect to the numbered paragraphs in the Complaint:

1. DSNB admits that the Complaint purports to bring a class action on behalf of certain DSNB credit-card customers; DSNB denies all remaining allegations.

2. Denied.

1           3.       DSNB admits that it markets debt cancellation programs entitled Credit  
2 Protection, which cancels all or a portion of the enrolled cardholder's debts in certain  
3 circumstances. DSNB further admits that Credit Protection is and has been marketed, at various  
4 times, via retail locations, direct mail, and/or telephone. The text of any such marketing speaks  
5 for itself. DSNB denies all remaining allegations.

6           4.       Denied.

7           5.       DSNB admits that it mails written materials to cardholders who enroll in Credit  
8 Protection. DSNB denies all remaining allegations.

9           6.       Denied.

10          7.       Denied.

11          8.       DSNB admits that a denial of benefits does not, under a debt cancellation  
12 contract, entitle the purchaser of the contract to either a refund of premiums or a waiver of the  
13 obligation to make continued payments in exchange for continued application of the contract.  
14 DSNB denies all remaining allegations.

15          9.       Denied.

16          10.      Denied.

17          11.      The allegations in paragraph 11, including subparagraphs (a)-(c), are conclusions  
18 of law and no response is required. To the extent a response is required, DSNB admits that this  
19 Court has subject matter jurisdiction for this case based on Plaintiff's allegations, which DSNB  
20 denies.

21          12.      The allegations in paragraph 12 are conclusions of law and no response is  
22 required. To the extent a response is required, DSNB admits that this Court has personal  
23 jurisdiction for this case based on Plaintiff's allegations, which DSNB denies.

24          13.      The allegations in paragraph 13 are conclusions of law and no response is  
25 required. To the extent a response is required, DSNB admits that this Court has venue for this  
26 case based on Plaintiff's allegations, which DSNB denies.

14. DSNB admits that it began issuing Macy's cards in or about November 2005, and that it is the issuer of Ms. Denton's Macy's credit card account. DSNB further admits that Ms. Denton was enrolled in a debt cancellation program entitled Account Protection in or about June 2002. DSNB lacks information sufficient to admit or deny facts regarding Ms. Denton's remaining allegations.

15. DSNB admits that it is a subsidiary of Citibank, N.A., and that it is located in Sioux Falls, South Dakota. DSNB further admits that no individual or corporate entity, other than DSNB, is named as a defendant in this lawsuit.

16. DSNB admits that it is a credit card issuer for Macy's, Inc., and that cards issued by DSNB bear the marks of store brands such as Bloomingdale's and Macy's. DSNB denies all remaining allegations.

17. DSNB lacks information sufficient to admit or deny the allegations.

18. DSNB admits that Credit Protection is marketed as cancelling credit card payments or balances in certain circumstances. DSNB denies all remaining allegations.

19. DSNB admits that it provides written materials to cardholders purchasing a debt cancellation contract. DSNB denies all remaining allegations.

20. DSNB admits that certain of the Credit Protection programs provide for debt cancellation based on specific events including those identified in Paragraph 20. The Account Protection program in which Plaintiff is enrolled provides for debt cancellation based on Involuntary Unemployment, Total Disability, and Loss of Life. DSNB denies all remaining allegations.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

1 27. Denied.

2 28. DSNB admits that there it charges a monthly amount, which varies, for Credit  
3 Protection and Account Protection programs. The charge assessed to Ms. Denton for Account  
4 Protection is \$0.69 per \$100 balance on the account. DSNB denies all remaining allegations.

5 29. The allegation purports to state a hypothetical, rather than a fact, and therefore  
6 requires no response.

7 30. Denied.

8 31. DSNB admits that there are personnel trained to assist with questions regarding  
9 Credit Protection and Account Protection. DSNB denies all remaining allegations.

10 32. Denied.

11 33. Denied.

12 34. DSNB admits that a denial of a claim does not, under a debt cancellation contract,  
13 entitle the purchaser of the contract to either a refund of premiums or a waiver of the obligation  
14 to make continued payments in exchange for continued application of the contract. DSNB  
15 denies all remaining allegations.

16 35. Denied.

17 36. Denied.

18 37. DSNB lacks information sufficient to admit or deny facts regarding Ms. Denton's  
19 residence.

20 38. DSNB admits that it began issuing Macy's cards in or about November 2005, and  
21 that it is the issuer of Ms. Denton's Macy's credit card account. DSNB lacks information  
22 sufficient to admit or deny facts regarding Ms. Denton's remaining allegations.

23 39. DSNB admits that Ms. Denton was enrolled in a debt cancellation program  
24 entitled Account Protection in or about June 2002, and that DSNB issues Ms. Denton's Macy's  
25 account. DSNB denies all remaining allegations.

40. DSNB denies that Ms. Denton is ineligible for the benefits of her Account Protection program. DSNB lacks information sufficient to admit or deny facts regarding Ms. Denton's self-employed status. DSNB denies all remaining allegations.

41. DSNB admits that it has received payments from Ms. Denton for her Account Protection program. DSNB denies all remaining allegations.

42. DSNB lacks information sufficient to admit or deny whether "Ms. Denton's business experienced financial hardship." DSNB denies all remaining allegations.

43. Denied.

44. DSNB admits that Ms. Denton's Account Protection program was cancelled in or about December 2009 due to her account being delinquent. DSNB further admits that Ms. Denton called on or about December 22, 2009 to make an inquiry regarding Account Protection. DSNB denies all remaining allegations.

45. DSNB admits that Ms. Denton asked to be re-enrolled in the Account Protection program. DSNB denies all remaining allegations.

46. Denied.

47. DSNB admits that Ms. Denton is still enrolled in the Account Protection program. DSNB denies all remaining allegations.

48. DSNB admits that plaintiff purports to bring this case on behalf of herself and others. The remaining allegations are conclusions of law as to which no response is required; to the extent that a response is required, DSNB denies that this case may be properly certified as a class action pursuant to Federal Rule of Civil Procedure 23, and denies all remaining allegations.

49. DSNB admits that plaintiff seeks damages and equitable relief as a class representative and brings an action for breach of contract and unjust enrichment. This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the covenant of good faith and fair dealing, and therefore no response is required to that allegation. DSNB denies all remaining allegations.

1           50.     DSNB admits that plaintiff purports to bring this case on behalf of herself and  
2 others. The remaining allegations are conclusions of law as to which no response is required; to  
3 the extent that a response is required, DSNB denies that this case may be properly certified as a  
4 class action pursuant to Federal Rule of Civil Procedure 23, and denies all remaining allegations.

5           51.     Denied.

6           52.     DSNB admits that plaintiff proposes a class and subclass as described in  
7 paragraph 52. DSNB denies that this case may be properly certified as a class action pursuant to  
8 Federal Rule of Civil Procedure 23, and denies all remaining allegations.

9           53.     DSNB admits that plaintiff proposes a subclass as described in paragraph 53.  
10 DSNB denies that this case may be properly certified as a class action pursuant to Federal Rule  
11 of Civil Procedure 23, and denies all remaining allegations.

12          54.     The allegations in paragraph 54 are conclusions of law and no response is  
13 required.

14          55.     DSNB admits that plaintiff proposes to exclude from the purported class certain  
15 persons and entities as set forth in paragraph 55. DSNB denies that this case may be properly  
16 certified as a class action pursuant to Federal Rule of Civil Procedure 23, and denies all  
17 remaining allegations.

18          56.     Denied.

19          57.     Denied.

20          58.     Denied.

21          59.     DSNB lacks information sufficient to admit or deny facts regarding the  
22 competency of counsel. DSNB denies all remaining allegations.

23          60.     Denied.

24          61.     DSNB repeats and reasserts each and every response to the allegations asserted in  
25 the foregoing paragraphs with the same force and effect as if fully set forth here.

26          62.     DSNB admits that DSNB and plaintiff are parties to a debt cancellation contract  
27 governing the Account Protection program.

63. DSNB admits that the debt cancellation contract provides for certain benefits in specified circumstances. DSNB further admits that cardholders who enter into debt cancellation contracts must make payments under the contract. DSNB denies all remaining allegations.

64. DSNB admits that it mails written materials to a cardholder purchasing a debt cancellation contract after the cardholder enrolls in the debt cancellation program. DSNB denies all remaining allegations.

65. Denied.

66. Denied.

67. This Court's order of August 1, 2011 dismissed plaintiff's claim for unconscionability as preempted by the National Bank Act and related federal regulations and because it is a defense to a contract, not an independent claim, and therefore no response is required to that allegation. To the extent any other response is required, DSNB denies that allegation. DSNB denies all remaining allegations.

68. Denied.

69. DSNB denies that plaintiff filed claims and sought to receive any benefit promised by DSNB related to her Account Protection program. DSNB lacks information sufficient to admit or deny facts regarding any purported member of the putative Subclass. DSNB denies all remaining allegations.

70. Denied.

71. This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the covenant of good faith and fair dealing, and therefore no response is required. To the extent required, DSNB repeats and reasserts each and every response to the allegations asserted in the foregoing paragraphs with the same force and effect as if fully set forth here.

72. This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the covenant of good faith and fair dealing, and therefore no response is required.

73. This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the covenant of good faith and fair dealing, and therefore no response is required.

1           74.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
2 covenant of good faith and fair dealing, and therefore no response is required.

3           75.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
4 covenant of good faith and fair dealing, and therefore no response is required.

5           76.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
6 covenant of good faith and fair dealing, and therefore no response is required.

7           77.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
8 covenant of good faith and fair dealing, and therefore no response is required.

9           78.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
10 covenant of good faith and fair dealing, and therefore no response is required.

11          79.     This Court's order of April 11, 2012 dismissed plaintiff's claims for breach of the  
12 covenant of good faith and fair dealing, and therefore no response is required.

13          80.     DSNB repeats and reasserts each and every response to the allegations asserted in  
14 the foregoing paragraphs with the same force and effect as if fully set forth here.

15          81.     Denied.

16          82.     This Court's order of August 1, 2011 dismissed plaintiff's claim for  
17 unconscionability as preempted by the National Bank Act and related federal regulations and  
18 because it is a defense to a contract, not an independent claim, and therefore no response is  
19 required to that allegation. To the extent any other response is required, DSNB denies that  
20 allegation. DSNB denies all remaining allegations.

21          83.     Denied.

22          84.     Denied.

23          85.     DSNB repeats and reasserts each and every response to the allegations asserted in  
24 the foregoing paragraphs with the same force and effect as if fully set forth here.

25          86.     DSNB admits that plaintiff seeks the relief described in paragraph 86. DSNB  
26 denies all remaining allegations.



1           87.     DSNB admits that plaintiff seeks the relief described in paragraph 87. DSNB  
2 denies all remaining allegations.

3           88.     DSNB repeats and reasserts each and every response to the allegations asserted in  
4 the foregoing paragraphs with the same force and effect as if fully set forth here.

5           89.     DSNB admits that plaintiff seeks the relief described in paragraph 89. DSNB  
6 denies all remaining allegations.

7           90.     DSNB admits that plaintiff seeks the relief described in paragraph 90. DSNB  
8 denies all remaining allegations.

9           91.     DSNB admits that plaintiff seeks the relief described in paragraph 91. DSNB  
10 denies all remaining allegations.

11           92.     DSNB repeats and reasserts each and every response to the allegations asserted in  
12 the foregoing paragraphs with the same force and effect as if fully set forth here.

13           93.     DSNB admits that plaintiff seeks the relief described in paragraph 93. DSNB  
14 denies all remaining allegations.

15           94.     Except as expressly admitted herein, DSNB denies the remaining allegations in  
16 plaintiff's complaint and the whole thereof.

17                               **AFFIRMATIVE DEFENSES**

18           Without assuming any burden of proof it would not otherwise bear, DSNB asserts the  
19 following affirmative defenses. DSNB reserves the right to assert further defenses that may arise  
20 or be identified in the course of further investigation, discovery, or litigation of this action,  
21 including, in the event a class is certified, the right to advance additional defenses pertinent to  
22 class members. For purposes of these affirmative defenses, references to "DSNB" include any  
23 predecessors in interest.

24                               **FIRST AFFIRMATIVE DEFENSE**

25           Plaintiff fails to state any claim upon which relief can be granted.

26                               **SECOND AFFIRMATIVE DEFENSE**

1 Plaintiff's claims are preempted, in whole or in part, by federal law, including, without  
2 limitation, the National Bank Act, 12 U.S.C. § 21 et seq, and regulations promulgated  
3 thereunder.

4 **THIRD AFFIRMATIVE DEFENSE**

5 Plaintiff lacks standing to assert any of the alleged claims.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitation,  
8 laches, and/or other time bars.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 Plaintiffs' claims are barred by plaintiffs' agreement to the terms and provisions of  
11 contracts with DSNB.

12 **SIXTH AFFIRMATIVE DEFENSE**

13 Plaintiff is barred from challenging DSNB's interpretation, application and  
14 implementation of the terms and provisions of the contracts governing her account because  
15 Plaintiff acquiesced in DSNB's interpretation, application and implementation of the contractual  
16 terms and provisions as a course of dealing.

17 **SEVENTH AFFIRMATIVE DEFENSE**

18 Plaintiff's claims are barred by the voluntary payment doctrine and/or other legal ground  
19 in that the obligations and fees about which plaintiff complains were paid voluntarily.

20 **EIGHTH AFFIRMATIVE DEFENSE**

21 Plaintiff's claims are barred by her own voluntary actions in incurring credit card debt  
22 when plaintiff knew or should have known she had entered into a contract the terms of which  
23 provided for DSNB to charge a fee based on the amount of her month-end credit card balance.

24 **NINTH AFFIRMATIVE DEFENSE**

25 Plaintiff's alleged injuries were caused, in whole or in part, by her voluntary actions in  
26 initiating and maintaining a credit-card balance that incurred a fee associated with her debt  
27 suspension or debt cancellation program.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by her failure to mitigate her damages, if any.

**ELEVENTH AFFIRMATIVE DEFENSE**

For the foregoing reasons and others, Plaintiffs' claims are barred by assumption of risk, consent, estoppel, license, notification, ratification, acceptance, acquiescence, waiver, release, accord, satisfaction, and/or by virtue the parties' course of dealing. Any equitable claim asserted by Plaintiff is furthermore barred by unclean hands.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, based on the failure of a condition precedent.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Even if not applicable to plaintiff, some or all of the affirmative defenses asserted above may be applicable to one or more of the putative class members whom plaintiff may seek to represent. In the event that any attempt is made to certify a class in this action, DSNB reserves the right to identify and advance any further affirmative defenses that may apply to persons other than the named plaintiff herein.

**AFFIRMATIVE DEFENSE CONCERNING ARBITRATION**

Upon information and belief, certain members of the purported class and subclasses that plaintiff seeks to represent have arbitration agreements with DSNB. DSNB does not waive, or agree to waive, its entitlement to seek to arbitrate any claim by such persons, or any claim by any other person; nor does DSNB waive, nor agree to waive, its right to stay any judicial proceedings, in favor of arbitration, with respect to claims asserted by or on behalf of any person other than the named plaintiff against whom DSNB now answers. In the event that any attempt is made to certify a class in this action, DSNB intends to invoke its right to stay judicial proceedings as to claims of persons, other than the present named plaintiff against whom DSNB

now answers, in favor of arbitration of claims advanced by or on behalf of such persons, who have contractually agreed to arbitrate claims against DSNB or its predecessors in interest.

Respectfully submitted,

s/ ROBERT W. TRENCHARD

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s/ NOAH A. LEVINE

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May 9, 2012

*Counsel for Defendant Department Stores National Bank*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 9, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I am aware of no non-CM/ECF participants to whom this document should be mailed by United States Postal Service.

DATED: May 9, 2012

s/ ROBERT W. TRENCHARD  
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